(4)

No. 99-1294

Supreme Court, U.S.
FILED
MAR 3 1 2000
CLERK

In The

Supreme Court of the United States

HOLMES FOSTER, in his official capacity as Superintendent of Banking and Administrator of Electronic Transfer of Funds, Iowa Division of Banking, Iowa Department of Commerce,

Petitioner,

v.

BANK ONE, UTAH, NATIONAL ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

AMICI CURIAE BRIEF OF IOWA BANKERS ASSOCIATION, IOWA INDEPENDENT BANKERS ASSOCIATION, IOWA'S COMMUNITY BANKERS, AND IOWA CREDIT UNION LEAGUE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ROBERT A. GAMBLE
JULIE JOHNSON MCLEAN
DEBORAH M. THARNISH*
DAVIS, BROWN, KOEHN, SHORS & ROBERTS, P.C.
The Financial Center
666 Walnut Street, Suite 2500
Des Moines, IA 50309
(515) 288-2500

Attorneys for Amici Curiae
*Counsel of Record**
Iowa Bankers Association
Iowa Independent Bankers Association
Iowa's Community Bankers
Iowa Credit Union League

March 31, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST OF *AMICI CURIAE* ... 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 3

ARGUMENT:

I. THE EIGHTH CIRCUIT ORDER WILL HAVE A SUBSTANTIAL ADVERSE EFFECT UPON IOWA CONSUMERS, COMPETITIVE EQUALITY AMONG FINANCIAL INSTITUTIONS, AND THE DUAL BANKING SYSTEM 4

II. THE EIGHTH CIRCUIT ERRED IN FINDING THAT CHAPTER 527 IS PREEMPTED BY THE NATIONAL BANK ACT 9

III. THE SUPREME COURT SHOULD CONSIDER THE EFFECT OF THE EFTA ON STATE REGULATION OF NATIONAL BANK ATMs 14

IV. THE EFTA PROVIDES FOR STATE ENFORCEMENT OF STATE LAWS REGULATING ATMs 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Barnett Bank v. Nelson, 517 U.S. 25 (1996) 2, 4, 10, 11, 13, 14

First Nat'l Bank in Plant City, Florida v. Dickinson, 396 U.S. 122 (1969) 6, 7

First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co., 385 U.S. 252 (1966) 6, 7

First Nat'l Bank of McCook, Neb. v. Fulkerson, No. 98-D-1024 (D. Colo. March 7, 2000) 20

Lewis v. B. T. Investment Managers, Inc., 447 U.S. 27 (1980) 12

CONSTITUTION, STATUTES, RULES AND LEGISLATIVE MATERIALS

Commerce Clause 12, 13

12 U.S.C. §1 7

12 U.S.C. §36 10

12 U.S.C. §36(g)(1) 8

12 U.S.C. §36(j) 2, 9, 10

15 U.S.C. §1693 16

15 U.S.C. §1693(b) 14

15 U.S.C. §1693a(8) 14, 18

15 U.S.C. §1693c 14

15 U.S.C. §1693d 14

15 U.S.C. §1693e 14

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. §1693f 14

15 U.S.C. §1693g 14

15 U.S.C. §1693h 14

15 U.S.C. §1693o 18

15 U.S.C. §1693o(a) 15

15 U.S.C. §1693(a)(1)(A) 18

15 U.S.C. §1693q 4, 14, 15, 16, 18, 19

15 U.S.C. §1693r 16

143 Cong. Rec. S5637-01 (1997) 7, 8

Consumer Leasing Act, 15 U.S.C. §1667(e) 16

Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996) 2

Fair Credit Reporting Act, 15 U.S.C. §1681(t) 16

Fair Debt Collection Practices Act, 15 U.S.C. §1692(n) 16

Federal Electronic Funds Transfer Act, 15 U.S.C. §1691 4

Gramm – Leach – Bliley Financial Modernization Act of 1999, Pub. L. No. 106-102, §7-2, 133 Stat. 1338 (1999) (codified at 15 U.S.C. §1693b(d)(3)) 16

Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §2616 (1974) 16

Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 11 Stat. 238 (1997) 7

TABLE OF AUTHORITIES – Continued

Page

Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2349 (1994) 8

Truth in Lending Act, 15 U.S.C. §1666j 16

12 C.F.R. pt. 205 12

12 C.F.R. §205.12 14

12 C.F.R. §7.4403-4405 9

Iowa Code §527 ..... *passim*

Iowa Code §527.1(1) 17

Iowa Code §527.1(2) 17

Iowa Code §527.2-5 (1999) 17

Iowa Code §527.2(9) (1999) 18

Iowa Code §527.4(1) 3, 4, 12

Iowa Code §527.5(2)a 5, 6

Iowa Code §527.5(3) 3

Iowa Code §527.5(5) 3, 4

Iowa Code §527.5(6) 5

Iowa Code §527.5(8)a 5

Iowa Admin. Code §187-20.4(3)(b)(5) 5

S. Rep. No. 95-915 at 6 (1978) 16

S. Rep. No. 104-185 (1996) 10

MISCELLANEOUS

OCC Interpretive Letter No. 772 (March 3, 1997) 2

OCC Interpretive Letter No. 821 (February 17, 1998) 2

STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

This brief is submitted on behalf of four *amici curiae*: the Iowa Bankers Association; the Iowa Independent Bankers Association; Iowa's Community Bankers; and the Iowa Credit Union League.

The Iowa Bankers Association ("**IBA**") is a non-profit corporation whose 432 members include national banks, state banks, and federally-chartered savings associations of all sizes and comprise in excess of 92% of the banks and savings associations conducting business in Iowa. Its members are both independent and affiliated with holding companies. The IBA provides a variety of services including educational, legislative and other services to its members.

The Iowa Independent Bankers Association ("**IIBA**") is a non-profit corporation with 240 members representing independent, state-chartered and federally-chartered banks operating in Iowa. The IIBA provides educational, legislative and other services to its members.

Iowa's Community Bankers ("**ICB**") is a non-profit corporation with members representing many of Iowa's savings associations. ICB provides educational and legislative services to its members.

The Iowa Credit Union League ("**ICUL**") is a non-profit corporation with 202 members representing 100% percent of the state-chartered and federally-chartered credit unions doing business in Iowa. The ICUL provides educational, legislative and other services to its members.

---

[1] Pursuant to Rule 37(6) of the Rules of the Supreme Court of the United States, no counsel for either party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission. Written consents of the *Petitioner* and the *Respondent* have been obtained and submitted to the Clerk of the Supreme Court of the United States with this brief.

Credit unions, savings associations, state-chartered and federally-chartered banks, and bank holding companies do not always agree regarding regulatory issues. In the matter now before the Supreme Court, however, the *amici* do agree that the action taken by the Iowa Superintendent of Banking to prohibit the deployment of automated teller machines ("**ATMs**") by Bank One, Utah, National Association ("**Bank One**") in Iowa in violation of Iowa's Electronic Transfer of Funds Act, Iowa Code Chapter 527 ("**Chapter 527**") should be supported. Because of their representation of more than 95% of the banks, savings associations and credit unions in Iowa, the *amici* are uniquely qualified to comment on the decision of the Eighth Circuit Court of Appeals both from a legal perspective and a policy perspective.

STATEMENT OF THE CASE

In November, 1996, Congress enacted the Economic Growth and Regulatory Paperwork Reduction Act of 1996, Pub. L. 104-208, 110 Stat. 3009 (1996) ("**EGRPRA**"). Section 2205 of EGRPRA amended 12 U.S.C. §36(j) of the National Bank Act ("**NBA**") by deleting ATMs from the definition of branch. As a result, national banks are no longer required to apply to the Office of the Comptroller of the Currency ("**OCC**") for authority to establish ATMs (which by definition include automated loan machines), thereby reducing the OCC regulatory paperwork as intended by EGRPRA.

Based upon EGRPRA, and apparently encouraged by the preemption language in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996), the OCC issued Interpretive Letter No. 772 dated March 6, 1997, and Interpretive Letter No. 821 dated February 17, 1998, in which the OCC concluded that national banks may establish and operate ATMs at any geographic location without regard to state geographic restrictions and related state approval requirements. In 1997, Bank One entered into an agreement with Sears, Roebuck & Co. ("**Sears**") to establish and operate ATM

machines in eleven or more Sears stores and thirteen other locations in Iowa.

In October of 1997, Michael K. Guttau, then Iowa Superintendent of Banking (the "**Superintendent**"), ordered Sears to cease operation regarding the Bank One ATMs. In December of 1997, the Superintendent filed suit in Iowa state court against Sears. As a result of that litigation, Bank One filed a Complaint in the United States District Court for the Southern District of Iowa seeking an injunction to prevent enforcement of Chapter 527 by the Superintendent against Bank One. United States District Court Judge Ronald E. Longstaff denied the request by Bank One for a preliminary injunction (the "**District Court Order**") and Bank One appealed the result as to the following three specific provisions: (i) Geographic restrictions, Iowa Code §527.4(1); (ii) Informational statement and approval by the Superintendent, §527.5(3); and (iii) Advertising restrictions, §527.5(5).

In a decision which includes broad federal preemption language, a three-judge panel of the Eighth Circuit Court of Appeals in a 2-1 decision reversed the District Court Order and directed that the District Court enter a permanent injunction against the Superintendent (the "**Eighth Circuit Order**"). The United States District Court then entered a permanent injunction which enjoins enforcement by the Superintendent of such sections of Chapter 527. The District Court has suspended enforcement of the permanent injunction pending the result of the Superintendent's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The United States Supreme Court should consider granting the Petition For Writ of Certiorari filed by the State of Iowa on behalf of the Superintendent for the following reasons:

I. The Eighth Circuit Order will have a substantial adverse effect on the dual banking system, result in a

competitive advantage for national banks unintended by EGRPRA, permit more expansive interpretations and regulations by the OCC, and provide unwarranted support for national banks in cases pending in other jurisdictions.

II. The Eighth Circuit erred in holding that Chapter 527 is preempted under the tests established by the Supreme Court in *Barnett Bank v. Nelson*, 517 U.S. 25 (1996).

III. The Supreme Court should consider the effect of the federal Electronic Funds Transfer Act, 15 U.S.C. §1691 et seq. ("**EFTA**"), on state regulation of national bank ATMs. The Eighth Circuit erred in holding: (i) that the amendment to the NBA contained in EGRPRA makes clear the intention of Congress that ATMs are not to be subject to state regulation; (ii) that the anti-preemption section of EFTA is specifically limited to the provisions of the EFTA; and (iii) that nothing in EFTA grants the states additional authority to regulate national banks. The holding does not reflect the content or the intent of the EFTA anti-preemption section. 15 U.S.C. §1693q.

IV. The EFTA provides for state enforcement of state laws regulating ATMs.

ARGUMENT

I. THE EIGHTH CIRCUIT ORDER WILL HAVE A SUBSTANTIAL ADVERSE EFFECT UPON IOWA CONSUMERS, COMPETITIVE EQUALITY AMONG FINANCIAL INSTITUTIONS, AND THE DUAL BANKING SYSTEM.

The Eighth Circuit Order discussed all three of the sections of Chapter 527 that were the subject of Bank One's appeal, but concluded only that Bank One's ATMs are not subject to the following restrictions contained in Chapter 527: (i) §527.4(1) relating to a requirement of an in-state office; and (ii) §527.5(5) which prohibits advertising on ATMs and requires disclosure of ownership information. The Eighth Circuit did not reach Bank One's remaining challenges to Chapter 527 in view of its holding on the preemption issue. The Eighth Circuit Order at 190 F.3d at

850, contains the following broad language regarding the preemption of state ATM laws:

> Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.

Bank One elected not to appeal from the District Court Order regarding the following four sections of Iowa law that impose as great or greater consumer protections than the sections of Chapter 527 that were the subject of the appeal:

1. Iowa Code Section 527.5(6), which regulates the fees that may be charged by the owner of an ATM to the financial institution that issued the ATM card used by the customer.
2. Iowa Code Section 527.5(2)(a), the universal access provision which makes ATMs available for use on a nondiscriminatory basis by any other financial institution which has its principal place of business in Iowa, and by all customers to whom a financial institution using the ATM has issued an access card approved by the Superintendent.
3. Iowa Code Section 527.5(8)(a), which requires that all ATMs in Iowa be connected to a "central routing unit" approved pursuant to Chapter 527; and
4. Iowa Admin. Code Section 187-20.4(3)(b)(5), which requires that most ATM transactions be routed through the central routing unit.

Since the District Court Order regarding the above sections were not made part of the appeal and since the District Court Order did not grant the preliminary injunction requested by Bank One, the above sections remain in effect and binding upon Bank One.

If the Eighth Circuit Order becomes final, Bank One or other national banks may consider that, notwithstanding the District Court Order, they may rely upon the broad preemption language of the Eighth Circuit Order and begin, for example, to restrict or limit consumer access to Iowa ATMs in violation of the universal access requirement of Iowa Code Section 527.5(2)(a). The result of such action will be contrary to the District Court Order, detrimental to Iowa state-chartered financial institutions, and Iowa consumers, and may require further time consuming and expensive litigation. The Supreme Court now has the opportunity to bring finality to the issues relating to the applicability of state electronic funds transfer laws to national banks not only in Iowa but in other states as well.

The Eighth Circuit holding on federal preemption is a severe blow to the dual banking system and competitive equality. Judge Bright in his dissent notes that Chapter 527 applies with equal force against both state and national banks, and that "the NBA has been repeatedly interpreted to prevent such competitive imbalances and to insure that national banks are allowed to compete on an even footing with state banks." *See First Nat'l Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966) ("Congress intended to place national and state banks on a basis of 'competitive equality'. . . . "); *First Nat'l Bank in Plant City, Florida v. Dickinson*, 396 U.S. 122, 131 (1969) (The NBA "respond(s) to the competitive tensions inherent in a dual banking structure . . . [and] reflects the congressional concern that neither system have advantages over the other. . . . "). 190 F.3d at 851.

The effect of the very broad Eighth Circuit holding on the preemption issue and the OCC interpretation of preemption is that state banks remain subject to Chapter 527 while national banks are not. If the holding is permitted to stand, the ultimate results, among others, may be:

- National banks may charge ATM fees to the customers of other banks; state banks may not.
- National banks may establish ATMs anywhere; state banks may not.

- National banks may employ discriminatory ATM consumer access practices; state banks may not.
- National banks may advertise on ATMs and avoid disclosure requirements identifying the name, address and telephone number of the owner of the ATM and the accessibility of the ATM (a consumer protection measure in the event of errors, malfunctions and other problems that consumers may experience in the operation of ATMs); state banks may not.
- National banks may avoid use of a state regulated routing system and state inspection requirements; state banks may not.

The overall result will be a substantial competitive advantage in favor of national banks in the growing area of electronic banking, and a significant weakening of the dual banking system. This, the *amici* submit, is not what Congress intended in EGRPRA and is not what the United States Supreme Court had in mind in the *Plant City* and *Logan* decisions cited above.

The Riegle-Neal Amendments Act of 1997, Pub. L. No. 105-24, 11 Stat. 238, 12 U.S.C. §1 et seq., relates to laws applicable to host state branches of out-of-state national banks and out-of-state state banks.

The legislative history of the Riegle-Neal Amendments Act of 1997 shows Congressional intent to preserve the dual system of regulation of financial institutions. In discussing the Riegle-Neal Amendments Act, Senator D'Amato stated at 143 Cong. Rec. S5637-01 (1997):

> [T]he bill is necessary to preserve confidence in a State banking charter for banks with such a charter that wish to operate in more than one State. In addition, it will curtail incentives for unnecessary federal preemption of State laws. Finally, the bill will restore the balance to the dual banking system by ensuring that neither charter operates at an unfair advantage in this new interstate environment.

In addition, Senator Moseley-Braun proclaimed at 143 Cong. Rec. S5637-01 (1997), the Riegle-Neal Amendments Act ensures:

> [T]he viability of our dual banking system by clearly stating that host State law applies to branches of State-chartered banks only to the extent that it applies to national bank branches. This bill levels the playing field between state-chartered banks and national-chartered banks that branch across state lines. It is important to the preservation of a strong, State-chartered banking system, which benefits the safety and soundness of the banking system as a whole.

Even though ATMs are no longer within the definition of branch in the NBA and, accordingly, national banks may establish ATMs without prior application and approval of the OCC, it is still important that ATMs be regulated in a manner that is consistent for both state and national banks. If EGRPRA is held to preempt state law, the playing field will be significantly tilted in favor of national banks. As a result, national banks will be able to operate ATMs in the state of Iowa without regard to state law, while Iowa financial institutions will remain subject to the restrictions of Chapter 527, precisely the type of result Congress sought to avoid by the Riegle-Neal Amendments Act of 1997.

The Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2349 (1994) (the "**Riegle-Neal Act**"), provides that a national bank shall not establish a de novo branch in a state in which the national bank does not have an office unless the state "opts in" to permit de novo branching. Iowa did not opt in and de novo branches are not permitted in Iowa. 12 U.S.C. §36(g)(1).

Recent OCC regulations, based upon its own interpretations and upon the Eighth Circuit Order, provide national banks or operating subsidiaries the authority to establish facilities at any geographic location. Such facilities may: (a) accept deposits through an ATM, make loans

through an ATM, pay withdrawals through an ATM with a telephone or televideo device that allows contact with bank personnel; (b) conduct a deposit production office that may solicit deposits, provide information about deposits, and assist persons in completing application forms and related documents to open a deposit account, staffed by persons who are not employed by the bank; and (c) conduct a loan production office and remote service unit. Any combination of the ATM, loan production office, and deposit production office is not a "branch" within the meaning of 12 U.S.C. §36(j). 12 C.F.R. §7.4403-4405. The new OCC regulations simply permit a national bank to establish a staffed facility that provides generally the same core banking functions (deposits, withdrawals and lending) as a traditional branch, free of state regulation and without formally establishing a de novo branch. Such facilities violate the spirit, if not the letter, of the Riegle-Neal Act and the Iowa law prohibition against de novo branching. Such regulations serve to further reduce competitive equality of state banks and tilt the balance in the dual banking system in favor of national banks.

The *amici* agree with the conclusion of Judge Bright in his dissent in the Eighth Circuit Order:

> Ironically the court's conclusion in this case is at odds with this important principle of competitive equality. State chartered banks remain bound by Iowa's consumer protection laws. To the extent that the court's decision today means that national banks are given a free pass, national banks thereby achieve a distinct and favored position under the law. *Competitive equality this is not.* (emphasis added).

II. THE EIGHTH CIRCUIT ERRED IN FINDING THAT CHAPTER 527 IS PREEMPTED BY THE NATIONAL BANK ACT.

The United States District Court correctly found that Iowa Code Chapter 527, including its enforcement by the

Superintendent, is not preempted by federal statutes or by common law principles of federal preemption.

Prior to 1996, ATMs were included within the definition of "branch" under the NBA. Since ATMs were "branches," ATMs were permitted to be established by national banks only to the extent provided by state law. 12 U.S.C. §36. In 1996, Congress adopted EGRPRA, which amends the definition of branch in the NBA 12 U.S.C. §36(j). Section 2205(a) of EGRPRA provides as follows:

> SEC. 2205. ELIMINATION OF BRANCH APPLICATION REQUIREMENTS FOR AUTOMATIC TELLER MACHINES
>
> (a) "BRANCH" UNDER NATIONAL BANK ACT. – Section 5155(j) of the Revised Statutes of the United States (12 U.S.C. 36(j)) is amended by adding at the end the following: "The term 'branch', as used in this section, does not include an automated teller machine or a remote service unit."

No provision in EGRPRA states that state laws regarding ATMs are preempted, nor does EGRPRA indicate any intention of Congress that state laws be preempted. Section 2205 of EGRPRA appears in Subtitle B entitled "Streamlining Government Regulation" under Chapter 1 entitled "Eliminating Unnecessary Regulatory Requirements and Procedures." The title of Section 2205 of EGRPRA clearly states its purpose: "Elimination of Branch Application Requirements for Automatic Teller Machines." No reference is made as to the effect of Section 2205 of EGRPRA upon state law.

Bank One cited as authority a statement in the legislative history of EGRPRA which suggests that Congress intended that the operation of ATMs by national banks will no longer be "subject to approval or geographic restrictions." S. Rep. No. 104-185, at 24 (1996). If Congress had in fact so intended, Congress would have specifically so stated in EGRPRA.

The principles of federal preemption of state law were recently set forth in *Barnett Bank v. Nelson*, 517 U.S. 25

(1996), wherein the Supreme Court stated that federal preemption is determined by Congressional intent. "Did Congress, in enacting the Federal Statute, intend to exercise its constitutionally delegated authority to set aside the laws of a State? If so, the Supremacy Clause requires courts to follow federal, not state, law." *Id.* at 30. The *Barnett* decision suggests that preemption will occur only in the following circumstances:

> A. Language in the federal statute reveals an "explicit congressional intent" to preempt state law.
>
> B. If no such explicit language appears, "courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language, nonetheless reveal a clear, but implicit, preemptive intent." Such a preemptive intent may be found in a federal statute which "creates a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."
>
> C. The federal law is in "irreconcilable conflict" with state law in which compliance with both statutes may be a "physical impossibility."
>
> D. A state law may "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

See id. at 31 (letters added for clarification and organization). As set forth below, the preemption tests set forth in *Barnett* are not met with respect to EGRPRA and therefore Chapter 527 is not preempted.

A. *No Explicit Language of Congressional Intent to Preempt Iowa Law.* EGRPRA has no statement of any specific Congressional intent to preempt state law governing ATMs.

B. *Non-Specific Language Does Not Reveal Clear Preemptive Intent.* EGRPRA does not have any nonspecific language that reveals a clear but implicit preemptive

intent. On the contrary, the structure and purpose of EGRPRA is clear in Section 2205: "Elimination of Branch Application Requirements for Automatic Teller Machines." The intent of EGRPRA is to reduce federal paperwork, not to provide expanded powers to national banks so that national banks may operate ATMs free of state law requirements. The purpose of EGRPRA is served by eliminating the need for national banks to make application to the OCC for authority to install ATMs. EGRPRA does not create or provide for any federal regulation so pervasive as to make reasonable the inference that Congress left no room for states to supplement it. Neither NBA, nor the OCC regulations promulgated thereunder, contain any pervasive scheme of federal regulation relating to the use of ATMs by national banks. The only pervasive federal regulation relating to ATMs is found in the EFTA and Federal Reserve Regulation E. 12 C.F.R. pt. 205. As set forth below, neither EFTA nor Regulation E preempt state law.

C. *Federal Law is Not in Irreconcilable Conflict With Iowa Law.* There is no irreconcilable conflict with state law, nor is compliance with Chapter 527 by a national bank a "physical impossibility" within the meaning of *Barnett.* The federal law regarding ATMs is found in the EFTA and Federal Reserve Regulation E. 12 C.F.R. pt. 205. Chapter 527 is not inconsistent with the EFTA or Regulation E and therefore Chapter 527 is not in conflict with federal law. Chapter 527 does not prevent a national bank from establishing ATMs in Iowa. It provides the means by which an out-of-state national bank may arrange, by contract, for the ownership and operation of ATMs in Iowa in compliance with Iowa Code §527.5(1). Chapter 527 is clearly distinguishable from the type of discriminatory statute invalidated in *Lewis v. B. T. Investment Managers, Inc.*, 447 U.S. 27 (1980), as violating the Commerce Clause cited by Bank One. The *Lewis* decision involved Florida statutes that prohibited banks and bank holding companies whose principal operations were outside Florida from operating investment subsidiaries or providing investment advice in

Florida. Chapter 527 strikes a reasonable balance between the "profound local concern", *id.* at 38, that states have for banking and related financial activities, and the Commerce Clause principle of preventing an undue burden on interstate commerce.

D. *Iowa Law Does Not Stand as an Obstacle to Congressional Purposes and Objectives.* Iowa law does not stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress.

The Supreme Court in *Barnett*, 517 U.S. at 34-35, discussed the applicability of state law to national banks:

> But, as we pointed out, *supra*, . . . where Congress has not expressly conditioned the grant of "power" upon a grant of state permission, the Court has ordinarily found that no such condition applies. In *Franklin Nat. Bank*, the Court made this point explicit. It held that Congress did not intend to subject national banks' power to local restrictions, because the federal power-granting statute there in question contained "no indication that Congress [so] intended . . . as it has done *by express language* in several other instances." (citations omitted).
>
> The Federal Statute before us, as in *Franklin Nat. Bank*, explicitly grants a national bank an authorization, permission, or power. And, as in *Franklin Nat. Bank*, it contains no "indication" that Congress intended to subject that power to local restriction. Thus, the Court's discussion in *Franklin Nat. Bank*, the holding of that case, and the other precedent we have cited above, strongly argue for a similar interpretation here – a broad interpretation of the word "may" that does not condition federal permission upon that of the State.

Contrary to the statutes construed in the *Barnett* and *Franklin* decisions, EGRPRA does not explicitly grant a national bank authority to establish and operate ATMs free of state law regulation. In fact, in EFTA, Congress has

specifically recognized the right of states to enact statutes relating to ATMs that require compliance by national banks. Such state laws are enforceable by the states if such laws are not inconsistent with EFTA. *See* 15 U.S.C. §1693q (1978); *see also* 12 C.F.R. §205.12.

Accordingly, the application of the tests set forth by the Supreme Court in *Barnett* does not result in a holding that state laws regarding ATMs are preempted.

III. THE SUPREME COURT SHOULD CONSIDER THE EFFECT OF THE EFTA ON STATE REGULATION OF NATIONAL BANK ATMs.

EFTA was enacted in 1978 "to provide a basic framework establishing the rights, liabilities and responsibilities of participants in electronic fund transfer systems. The primary objective of this Title, however, is the provision of individual consumer rights". 15 U.S.C. §1693(b). A national bank is, by definition, a financial institution subject to EFTA. 15 U.S.C. §1693a(8).

EFTA contains specific sections relating to disclosure of the terms and conditions of electronic fund transfers involving a consumer's account (§1693c); documentation of transfers (§1693d); notice of pre-authorized transfers (§1693e); error resolution procedures (§1693f); consumer liability (§1693g); liability of financial institutions (§1693h); and other specific regulations. In addition, however, EFTA contains a clear anti-preemption section, 15 U.S.C. §1693q, which permits state regulation of electronic fund transfers to the extent the regulation is not inconsistent with EFTA. Section 1693q provides:

> This Subchapter does not annul, alter, or affect the laws of any State relating to electronic fund transfers, except to the extent those laws are inconsistent with the provisions of this subchapter, and then only to the extent of the inconsistency. A State law is not inconsistent with this subchapter if the protection such law affords any

> consumer is greater than the protection afforded by this subchapter.

Enforcement of EFTA is, as to national banks, left to the OCC. 15 U.S.C. §1693o(a). It is important to note, however, that a determination of whether or not a state law is inconsistent with EFTA is to be made by the Federal Reserve Board, not the OCC. 15 U.S.C. §1693q. No such determination was requested or made prior to the issuance of the OCC Interpretive Letters or prior to the filing of the Complaint by Bank One.

The Eighth Circuit Order erroneously finds that EFTA does not apply to the establishment of ATM machines by Bank One in Iowa:

> Despite the State's claims, this anti-preemption provision is specifically limited to the provisions of the federal EFTA, and nothing therein grants the states any additional authority to regulate national banks. State regulation of national banks is proper where "doing so does not prevent or significantly interfere with the national bank's exercise of its powers." *Barnett Bank*, 116 S.Ct. at 1109. Congress has made clear in the NBA its intent that ATMs are not to be subject to state regulation, and thus the provisions of the Iowa EFTA that would prevent or significantly interfere with Bank One's placement and operation of its ATMs must be held to be preempted.

190 F.3d at 850.

The legislative history of the EFTA clearly suggests that states are allowed to apply more stringent consumer standards than the EFTA requires. The Committee on Bank, Housing and Urban Affairs reported to the United States Senate the following:

> The committee was also impressed with the experience of the $50 liability limit made applicable to credit cards in 1969 by the Truth in Lending Act. This provision has successfully limited consumer liability for lost or stolen credit cards

> while also promoting careful credit card handling and prompt notice of loss by consumers. Based on this experience, as well as favorable data in the seven states (Wisconsin, Iowa, Colorado, Minnesota, Montana, New Mexico, and Kansas) which recently have adopted a similar provision for EFTA, the committee concluded at a $50 liability ceiling was a workable and proven standard.

S. Rep. No. 95-915 at 6 (1978). The Gramm – Leach – Bliley Act of 1999, Pub. L. No. 106-102, §7-2, 113 Stat. 1338 (1999), 15 U.S.C. §1693, contains the ATM Fee Reform Act of 1999 which amends the EFTA by providing a federal statutory penalty if an ATM operator imposes an access fee and fails to provide notice of the fee and an opportunity for the customer to opt out of the transaction. Nothing in the ATM Fee Reform Act affects or modifies the anti-preemption sections of the EFTA which expressly permit states to adopt and enforce state electronic funds transfer laws that provide greater consumer protections than the EFTA.

Based on the legislative history of the EFTA and the anti-preemption section of EFTA, it is clear Congress did not intend to entirely preempt state law regulating electronic fund transfers. Instead, the EFTA and its legislative history expressly provide that states have the authority to enact laws and regulations that afford greater consumer protection than the EFTA. Such state laws will not be deemed as inconsistent with the EFTA. In fact, Congress anticipated such state laws would be enacted. *See* 15 U.S.C. §§1693q-r (1978).

The anti-preemption section of the EFTA is not unique among federal statutes that provide for consumer protection. Similar statutes appear in the Real Estate Settlement Procedures Act of 1974, 12 U.S.C. §2616; the Truth in Lending Act, 15 U.S.C. §1666j; the Consumer Leasing Act, 15 U.S.C. §1667(e); the Fair Credit Reporting Act, 15 U.S.C. §1681(t); and the Fair Debt Collection Practices Act, 15 U.S.C. §1692(n). Unless reviewed, the Eighth Circuit Order

may call into question the long recognized rights of states to enact and enforce consumer legislation more protective than the various federal statutes, and to have such state statutes, and their enforcement, remain binding upon national banks.

Iowa Code Chapter 527 provides several consumer protections not covered by the EFTA including:

A. Provisions resulting in a prohibition imposed by the Superintendent against consumer surcharging for ATM transactions. *See* Iowa Code §§527.2-.5 (1999).

B. Universal access which assures that an ATM card issued by any Iowa financial institution will be accepted at any other ATM located in Iowa. *See id.* The state of Iowa has a strong interest in protecting its consumers by assuring universal access to ATM machines at the lowest possible cost. *See* Iowa Code §§527.1(1) and (2) (1999) (stating that electronic fund systems should "provide reliable service to the consumer" and "not impair the safety and soundness of a person's funds").

C. Provisions that require the use of a state approved central routing unit thereby limiting the number of data processing systems through which an ATM transaction must pass, so that the cost of ATM transactions is not increased and transaction reliability is maintained. *See id.*

D. Assurance that consumers will be free of advertising in the use of ATM machines, yet provided essential information regarding the name, address and telephone number of the ATM owner. *See id.*

E. A limitation on transaction fees paid by card-issuing institutions to institutions that establish ATMs. Without such limitation, increased fees may be passed on to consumers. *See id.*

No portion of Chapter 527 is inconsistent with the letter or the spirit of the EFTA which clearly recognizes and gives effect to more restrictive state laws protecting consumers.

The *amici* submit that, upon review, the Supreme Court will agree that in view of the legislative history and anti-preemption language of the EFTA, state regulations which provide more stringent consumer protection that the EFTA are not preempted. To hold otherwise would construe the anti-preemption section of the EFTA from its clear meaning to no meaning.

IV. THE EFTA PROVIDES FOR STATE ENFORCEMENT OF STATE LAWS REGULATING ATMs.

The EFTA applies to "financial institutions" which include state and national banks. 15 U.S.C. §1693a(8). The agencies given administrative enforcement powers under the EFTA are set forth in 15 U.S.C. §1693o. Section 1693o(a)(1)(A) provides, in part, that "*[c]ompliance with the requirements imposed under this subchapter* shall be enforced. . . . in the case of . . . national banks, . . . by the Office of the Comptroller of the Currency." (emphasis added). However, as set forth above, under Section 1693q of the EFTA, state law is to be applied to the extent state law provisions are not inconsistent with the EFTA. The enforcement of Chapter 527, which is more restrictive than the EFTA, is not enforcement of "compliance with the requirements imposed under [the EFTA]." Rather, it is enforcement of Iowa state law by Iowa state authority. Nothing in the EFTA requires that state law be enforced as to national banks by the Office of the Comptroller of the Currency. The Superintendent does not seek to enforce the EFTA. The Superintendent seeks to enforce Chapter 527 as specifically applicable to all financial institutions, which are defined by the EFTA and by Chapter 527 to include national banks. Iowa Code §527.2(9) (1999).

As set forth above, the EFTA specifically recognizes the applicability of state law to electronic fund transactions if such law is not inconsistent with the EFTA. Section 1693q of the EFTA describes the authority of the Board of Governors of the Federal Reserve System, not the OCC, to determine whether state law is inconsistent with the EFTA:

> . . . The Board shall, upon its own motion or upon the request of any financial institution, State, or other interested party, submitted in accordance with procedures prescribed in regulations of the Board, determine whether a State requirement is inconsistent or affords greater protection. If the Board determines that a State requirement is inconsistent, financial institutions shall incur no liability under the law of that State for a good faith failure to comply with that law, notwithstanding that such determination is subsequently amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

By providing the Federal Reserve Board the power to determine whether or not state requirements are inconsistent with the EFTA, Congress has specifically recognized that state laws that are not inconsistent with the EFTA apply to electronic funds transfer transactions. By limiting the power of the OCC to enforcement of only those requirements imposed under the EFTA, Congress has recognized the power of states to enforce state electronic fund transfer laws that provide greater consumer protections than contained in the EFTA.

The Eighth Circuit interpretation of the anti-preemption section of the EFTA is overly restrictive in view of the plain language of section 1693q and the overall purpose of the EFTA as attempting to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in electronic fund transfer systems. If the Eighth Circuit Order is allowed to stand, the OCC will, in the name of judicial deference, have eliminated the state regulation of electronic transfer fund transactions specifically permitted in the anti-preemption section of the EFTA, and will have usurped the power to determine the extent of the applicability of state law, which Congress specifically reserved to the Federal Reserve Board.

CONCLUSION

Unless reviewed, the Eighth Circuit Order will serve as an overly broad directive to the District Court regarding the portions of the District Court Order from which no appeal was taken. At least one court has already relied upon the Eighth Circuit Order as authority that national bank ATMs are not subject to state regulation and state laws are preempted by federal law. *First Nat'l Bank of McCook, Neb. v. Fulkerson*, No. 98-D-1024 (D. Colo. March 7, 2000). In addition, the Eighth Circuit Order will continue to be a beacon for cases now pending in other states as well as potential future litigation. The Eighth Circuit Order sends the wrong signal: It supports unwarranted federal preemption; it renders meaningless the anti-preemption section of EFTA; it fails to recognize the intent of Congress that states have the right to impose and enforce laws and regulations that provide for greater consumer protections than that mandated by the EFTA; and it provides national banks a substantially favored position in contravention of competitive equality with state-chartered banks and thereby impairs the dual banking system.

For the foregoing reasons, as well as those urged by the Superintendent, the *amici* request that the Supreme Court grant the Superintendent's Petition For a Writ of Certiorari.

Respectfully submitted,

ROBERT A. GAMBLE
JULIE JOHNSON MCLEAN
DEBORAH M. THARNISH*
DAVIS, BROWN, KOEHN,
SHORS & ROBERTS, P.C.
The Financial Center
666 Walnut Street,
Suite 2500
Des Moines, IA 50309

Attorneys for Amici Curiae
*Counsel of Record**
Iowa Bankers Association
Iowa Independent Bankers
Association
Iowa's Community Bankers
Iowa Credit Union League

March 31, 2000